Supreme Court, U.S.
FILED
MAR 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-357

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF THE STATE OF VERMONT AS AMICUS CURIAE IN SUPPORT OF APPELLEES

JEFFREY L. AMESTOY
Attorney General
THOMAS R. VIALL
ROBERT C. SCHWARTZ
Assistant Attorneys General
State of Vermont
133 State Street
Montpelier, Vermont 05602

MICHAEL H. GOTTESMAN
(Counsel of Record)
Bredhoff & Kaiser
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
ARGUMENT	3
INTRODUCTION AND SUMMARY	3
I. THE REASONS ADVANCED BY ATA FOR OVERTURNING THIS COURT'S FLAT TAX DECISIONS ARE UNSOUND	10
II. PENNSYLVANIA'S MARKER FEE AND AXLE TAX ARE NOT INVALID UNDER THIS COURT'S FLAT TAX DECISIONS	20
A. The Marker Fee	21
B. The Axle Tax	22
CONCLUSION	24

TABLE OF AUTHORITIES

Cases: Page

Aero Mayflower Transit Co. v. Board of Railroad Comm'rs, 332 U.S. 495 (1947) 3
Aero Mayflower Transit Co. v. Georgia Public Service Comm'n, 295 U.S. 285 (1935) 3
Alaska v. Arctic Maid, 366 U.S. 199 (1961) 24
Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 (1977) 18
Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950) 3, 11-12, 16-18, 21-23
Clark v. Paul Gray, Inc., 306 U.S. 583 (1939) 3
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 9, 19-20
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 19, 20
Diamond v. Chakrabarty, 447 U.S. 303 (1980) 15
Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72 (1939) 3, 23
Evansville Airport v. Delta Airlines, 405 U.S. 707 (1972) 3, 12, 17-18, 20-23
Hendrick v. Maryland, 235 U.S. 610 (1915) 3
Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 24
Kane v. New Jersey, 242 U.S. 160 (1916) 3
Maryland v. Louisiana, 451 U.S. 725 (1981) 18
Massachusetts v. United States, 435 U.S. 444 (1978) 3, 12, 20, 21
Steelworkers v. Bouligny, Inc., 382 U.S. 145 (1965) 15
Texas Industries, Inc. v. Radcliff, 451 U.S. 630 (1981) 15
United States v. Topco Associates, 405 U.S. 596 (1972) 15
Western & Southern L. I. Co. v. Bd. of Equalization, 451 U.S. 648 (1981) 9

Constitution and Statutes:

Constitution of the United States, Commerce Clause ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Motor Carrier Act of 1980, P.L. 96-296 (1980):	
Section 19	5
Section 31(a)(1), 49 U.S.C. § 11503a	4, 17
Section 31(b), 49 U.S.C. § 10521(b)(4)	4
Public Law 98-369, 98th Cong., 2d Sess. (1984):	
Section 931	7
Section 933	7, 14
Section 934	14
Surface Transportation Assistance Act of 1982, P.L. 97-424 1982)	
Section 513(a), 26 U.S.C. § 4481(a)	12
Section 513(g)	7, 13
Legislative Materials:	
H.R. 4518, 98th Cong., 1st Sess. (1983)	6
H. Rep. No. 96-1069, 96th Cong., 2d Sess. (1980)	4-5
Oversight of the Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 98th Cong., 1st Sess. (1983)	6
Surface Transportation Issues: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 94th Cong., 2d Sess. (1984)	6-7
Reports to Congress:	
Alternatives To Tax on Use of Heavy Trucks (U.S. Department of Transportation, Federal High way Administration, 1984)	7, 12-14
Federal Highway Cost Allocation System (U.S. Department of Transportation, Federal Highway Administration, 1982)	7
Uniform State Regulations, Motor Carrier Act of 1980, Section 19 (U.S. Department of Transportation and Interstate Commerce Commission, 1982)	5-6

TABLE OF AUTHORITIES—Continued

Miscellaneous: Page

AASHTO Quarterly, July 1984 (American Association of State Highway and Transportation Officials) 11, 15

An Experiment In Federalism: Can the States Improve the Interstate Motor Carrier Taxation System? (National Governors' Association Center for Policy Research, Capital Ideas, Feb. 1, 1986 (revised)) 7

Comments of American Trucking Associations on Study of a Federal Weight-Distance Truck Tax, before the Federal Highway Administration, U.S. Department of Transportation, Dkt. No. 85-20 (Oct. 24, 1986) 11

Druhan, Federal Weight-Distance Tax, in AASHTO Quarterly, July 1984 15

Reith, TonMile Taxes Revisited, in AASHTO Quarterly, July 1984 ..... 10-11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-357

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants,

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF THE STATE OF VERMONT AS AMICUS CURIAE IN SUPPORT OF APPELLEES

Pursuant to Rule 36 of the Rules of this Court, the State of Vermont, by its Attorney General, respectfully submits this brief as *amicus curiae* in support of appellees.

INTEREST OF THE AMICUS CURIAE

The State of Vermont imposes several taxes or fees upon motor carriers, in order to raise revenues necessary to construct and maintain the State's highways and roads, including: (1) a very high registration fee ($1,240 per year for large trucks)—one of the highest in the nation, and nearly double the national average—*charged only to trucks registered in Vermont*, (2) a purchase and use tax *charged only to trucks registered in*

Vermont, (3) a fuel-use tax, charged to trucks whether registered in Vermont or elsewhere, based on the miles those trucks report they have driven in Vermont, and (4) a $50 annual highway user fee, charged to all trucks weighing 18,000 pounds or more, whether registered in Vermont or elsewhere. The monies collected in all four categories go into a special fund used for highway construction and maintenance. The $50 user fee is presently being challenged in the Vermont courts by the American Trucking Associations, Inc. ("ATA"), the lead appellant in this case, as violative of the Commerce Clause. This Court's disposition of ATA's challenge to Pennsylvania's marker fee in the instant case may affect the disposition of the pending challenge to Vermont's user fee.

While Vermont's current user fee is, in the case of Vermont-registered trucks, superimposed upon unreduced registration fees, earlier Vermont laws had attempted to calibrate the user fee's application to compensate for the fact that Vermont-registered trucks alone bore the burden of Vermont's exceptionally high registration fee. For thirty years prior to 1982, the user fee was charged only to non-Vermont-registered trucks. The 1982 Act extended the user fee to Vermont-registered trucks as well, but reduced the registration fee in an equal amount. These earlier fees were challenged by ATA and held violative of the Commerce Clause by the Vermont Supreme Court. The correctness of those holdings is presently before this Court on Vermont's conditional cross-petition for writ of certiorari in No. 86-276, which we assume is being held pending resolution of the instant case. This Court's disposition of ATA's challenge to the axle tax in the instant case may affect the disposition of the conditional cross-petition in No. 86-276.

ARGUMENT

INTRODUCTION AND SUMMARY

In an unbroken line of cases spanning 70 years, this Court has held that states may, without offending the Commerce Clause, impose "flat taxes" on motor vehicles to finance highway construction and maintenance, so long as the taxes are reasonable in amount, imposed in equal amount on interstate and intrastate commerce, and the state's total taxing scheme is not shown to impose costs on out-of-state vehicles excessive in comparison to the governmental benefit conferred.[1] In 1950, this Court was asked to overturn that line of cases, but declined to do so, stating that "[i]f a new rule . . . is to be declared, we think Congress should do it." *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 547 (1950). At the time of that ruling, Congress had already "passed comprehensive legislation regulating interstate carriers in which it is declared that 'Nothing in this chapter shall be construed to affect the powers of taxation of the several States . . .'" *id.* at 547 n.8.

In recent years, Congress has moved affirmatively to exercise its power under the Commerce Clause to monitor state taxation of motor carriers in order to prevent discrimination against interstate commerce. Accordingly, it is all the more appropriate today that "if a new rule . . . is to be declared, . . . Congress should do it."

---

[1] See, *e.g.*, *Hendrick v. Maryland*, 235 U.S. 610 (1915); *Kane v. New Jersey*, 242 U.S. 160 (1916); *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285 (1935); *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72 (1939); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Evansville Airport v. Delta Airlines*, 405 U.S. 707, 715-17 (1972); *Massachusetts v. United States*, 435 U.S. 444, 463-64 (1978). See also, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 & n.12 (1981).

In the Motor Carrier Act of 1980, Congress outlawed a particular form of state taxation—differential taxes on motor carrier property—that Congress determined "unreasonably burden and discriminate against interstate commerce," 49 U.S.C. § 11503a.[2] The Act stated that except for this restriction on property taxes, the Act "does not . . . affect the taxation power of a State over a motor carrier." 49 U.S.C. § 10521(b)(4). In a report accompanying the bill that became the 1980 Act, Congress made clear that it had determined *not* to place any restrictions at that time on state highway user taxes:

> The provisions of this section [§ 11503a] do not apply to that body of taxes known as highway user taxes that are levied on owners or operators of motor vehicles because of their use of public highways. These highway user taxes include, but are not limited to, motor fuel taxes, registration fees, drivers licenses, vehicle user taxes, ton-mile taxes, and other motor vehicle related taxes; the proceeds of these taxes, for the most part, are expended through a

---

[2] Section 11503a provides, in pertinent part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) assess motor carrier transportation property at a value that has a higher ratio to the true market value of the motor carrier transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;
>
> (2) levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection;
>
> (3) levy or collect an ad valorem property tax on motor carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

> State highway fund or otherwise earmarked for highway construction, maintenance, or operation.

H. Rep. No. 96-1069, 96th Cong. 2d Sess., at 45 (1980).

Although placing no restrictions on state user taxes in the 1980 Act, Congress in that Act made a finding that state licensing and registration requirements lacked uniformity and were burdensome to motor carriers, and directed an Executive Branch study of how those requirements could be made "more efficient and equitable." P.L. 96-296, § 19 (1980).[3] Out of this direction emerged a Report To Congress in December, 1982, submitted by the Department of Transportation and the Interstate Commerce Commission.[4] The principal focus of the report was on the taxes imposed by states on motor carriers, and one of the findings was that the nonuniformity of regulation was largely a product of the multiplicity and variety of taxes the states imposed. The report detailed the complexities involved in trying to achieve greater uniformity of state taxation while at the same time en-

---

[3] Section 19 provided:

> Congress hereby declares and finds that the individual State regulations and requirements imposed upon interstate motor carriers regarding licensing, registration, and filings are in many instances confusing, lacking in uniformity, unnecessarily duplicative, and burdensome and that it is in the national interest to minimize the burdens of such regulations while at the same time preserving the legitimate interests of the State in such regulation. Therefore, the Congress directs the Secretary of Transportation and the Interstate Commerce Commission, in consulation with the States and the various State agencies which administer such requirements and regulations and with the motor carrier industry . . . to develop legislative or other recommendations to provide a more efficient and equitable system of State regulations for interstate motor carriers. Such recommendations shall be made to the Congress not later than 18 months after the date of enactment of this Act.

[4] Department of Transportation and Interstate Commerce Commission, *Report to Congress, Uniform State Regulations, Motor Carrier Act of 1980, Section 19* (1982).

abling each state to secure the revenues it needs to maintain its highway system. The report canvassed a number of possible federal responses, ranging from no action to total federal preemption of the taxation of motor carriers. The report ultimately concluded:

> While the development of standards by the Federal Government has some benefits, state administrators are in a much better position to formulate standards to be implemented by the states. For this reason, it is recommended that a task force of state representatives responsible for registration, fuel taxes and third structure taxes be charged with defining uniform standards for state requirements imposed on motor carriers. [Report, p. 123.]

The report recommended further that Congress enact a law allowing the states two years to develop such standards, following which the Secretary of Transportation would be empowered to "promulgate a set of standards into law via the regulatory process," *id.*

The Administration proposed legislation implementing these recommendations in late 1983,[5] and hearings on these recommendations were conducted by Congress in late 1983 and early 1984.[6] At the 1983 hearings, representatives of the trucking industry announced that they were developing a competing proposal under which Congress would restrict the forms of state taxation without further delay.[7] That proposal was unveiled by ATA at

---

[5] H.R. 4518, 98th Cong., 1st Sess. (1983).

[6] *Oversight of the Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. (1983); *Surface Transportation Issues: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. (1984).

[7] *Oversight of the Motor Carrier Act of 1980, supra* n.6, at 279-80, 305-06, 311, 313.

the 1984 hearings.[8] Under ATA's proposal, Congress would prescribe standards for state taxation of motor carriers, prohibiting all forms of state taxation that did not conform to those standards. The standards would, *inter alia*, prohibit flat taxes. In explaining its proposal, ATA cited Pennsylvania's marker fee and axle tax as examples of what should be prohibited, advancing some of the same arguments as are now made in its brief to this Court.[9]

Representatives of the states opposed both the Administration's bill and ATA's proposal, urging that Congress withhold any legislation while the states undertook to develop more uniform standards of taxation.[10] Congress opted for the latter course, and the states, under the aegis of the National Governors' Association, are actively engaged in a program to develop uniform standards.[11]

The ongoing dialogue since 1980 between Congress, the pertinent agencies of the Executive Branch, the states, and the motor carrier industry, over how best to structure state taxation of motor carriers, has demonstrated that the problem is not susceptible to simple solution.[12] There are disagreements, *inter alia*, as to what

---

[8] *Surface Transportation Issues*, *supra* n.6, at 1343-65, 1369-71.

[9] *Id.* at 1346-47, 1352, 1362, 1370.

[10] *Id.* at 1201-13, 1319-22, 1327-28.

[11] For a description of this program, see "An Experiment in Federalism: Can the States Improve the Interstate Motor Carrier Taxation System?", National Governors' Association Center for Policy Research, *Capital Ideas*, Feb. 1, 1986 (revised).

[12] Congress has encountered these same complexities in attempting to improve the system of *federal* taxes imposed on motor carriers, and has commissioned several Executive Branch studies in that context. See, *e.g.*, P.L. 97-424, 97th Cong., 2d Sess. § 513(g) (1982); P.L. 98-369, 98th Cong., 2d Sess. §§ 931, 933 (1984); *Final Report [to Congress] on the Federal Highway Cost Allocation System* (1982), by the U.S. Department of Transportation, Federal Highway Administration; *Report to Congress: Alternatives To Tax on Use of Heavy Trucks* (1984), by the U.S. Dept. of Transportation, Federal Highway Administration. See pp. 12-14, *infra*.

the trucking industry's share of highway costs should be, the feasibility of and administrative costs attendant to various suggested taxing schemes, the proper allocation of taxing responsibility between federal and state governments, and the ways in which the states' variegated needs (stemming from differences in climate, geography, traffic, and density of in-state truck registrants) all can be served.[13]

With the matter now squarely on Congress' agenda, ATA asks this Court to reverse 70 years of precedent and, by constitutional fiat, to remove flat taxes from the range of permissible measures by which states can meet their highway construction and maintenance needs. That invitation would be controversial, in the current context,

---

[13] As examples of the varying state needs:

(1) Some states, like Vermont, are exposed to severe weather conditions and have generally mountainous terrains and many bridges, making road construction and repair costs per-mile higher than other states.

(2) States like Vermont that are geographically situated on routes that are heavily traveled by interstate carriers experience much heavier per-mile road damage by heavy trucks, and thus much higher costs of highway maintenance, than less heavily-trafficked states. As an example, Interstate 91, which is the principal artery linking eastern Canada with New England, runs the entire north-south length of Vermont. For most of its length, Interstate 91 is virtually on the border between Vermont and New Hampshire. But because it lies in Vermont, the cost of its maintenance falls on Vermont, not New Hampshire.

(3) States like Vermont that have relatively few trucks registered in-state in relation to total truck traffic on their highways (JA 198) cannot generate revenues from registration fees in the amounts available to states with higher density of in-state registrants. For example, while roughly 25% of the trucks traveling Pennsylvania's highways are registered in Pennsylvania (ATA Br. 33), less than 10% of the trucks traveling in Vermont are registered in Vermont.

A consequence of these combined factors is that Vermont is compelled to charge registration fees to Vermont-registered trucks that are nearly double the national average (JA 178).

even if the arguments advanced in its support were sound. The Constitution vests plenary authority in Congress to regulate interstate commerce, *Western & Southern L. I. Co.* v. *Bd. of Equalization*, 451 U.S. 648, 652-53 (1981); highway transport is a subject of continuous congressional oversight; Congress, since 1980, has demonstrated its preparedness to strike down state taxes imposed on the motor carrier industry when persuaded that there is discrimination against interstate commerce; and Congress has chosen to this point *not* to intervene with respect to state highway user taxes but instead to await state efforts at achieving greater uniformity. This is not, we submit, the time for judicial intervention through reversal of a doctrine that has stood for 70 years.

But even if this Court were prepared to intervene at this point upon a sufficient showing, ATA has not made that showing. Its arguments for overturning this Court's flat tax jurisprudence are unsound both in fact and in law. We demonstrate this at pp. 10-20, *infra*.

We then show, at pp. 20-24, that if this Court adheres to its existing flat tax decisions, Pennsylvania's marker fee and axle tax are valid. The marker fee is plainly within the ambit of those decisions. ATA contends that the axle tax is not, because, although it is imposed equally on in-state and out-of-state registrants, its enactment was accompanied by an equivalent reduction of the registration fee charged to in-state registrants and thus the entire brunt of the increase was visited on out-of-state registrants. That contention is fallacious, because it ignores that Pennsylvania had increased registration fees by more than the amount of the axle tax two years earlier. The effect on interstate commerce of the two enactments is no different than if Pennsylvania had in a single enactment left the registration fee unchanged and enacted the axle tax. If the latter would satisfy the Commerce Clause (and it would) the result cannot be different because Pennsylvania arrived at that result in two legislative steps rather than one.

I. THE REASONS ADVANCED BY ATA FOR OVERTURNING THIS COURT'S FLAT TAX DECISIONS ARE UNSOUND.

ATA contends that this Court's flat tax decisions "can no longer be regarded as controlling" (ATA Br. 41), both because the real world to which they apply has changed, and because this Court's understanding of the Commerce Clause has changed. We address these contentions in turn.

A. ATA's brief argues that the "critical" predicate for this Court's decisions upholding flat taxes was "concern about the feasibility of administering graduated highway taxes," ATA Br. 42. That concern, ATA's brief insists, no longer applies, and states can now without difficulty rely instead upon "a variety of mileage-related highway taxes" (*id.* 42). But in the dialogue now ongoing over proposed legislative solutions, ATA has asserted quite the opposite. There, it has declared that "the evidence is clear" that the costs to truckers and the public associated with administering mileage-related taxes are "outrageous" and disproportionate to the amounts collected. ATA's position, as articulated by the Director of its Department of Economics and Taxation, is as follows:

> Mileage or ton-mile taxes are self-reporting and depend upon those subject to the tax identifying themselves to the state. They are based on the honor system. Those who are honorable will pay the tax and the others will not.
>
> The only way to ensure compliance with such a tax is for the state to set up many "ports of entry" stations, including interior points, and to audit the records of the carrier. Oregon, for example, has 67 ports at which trucks must stop and be checked for compliance. . . .
>
> • • • •

> Ton-mile and mileage taxes are also a substantial burden on the taxpayers. A study . . . found that carrier detention costs associated with stopping at a minimum of two ports of entry may equal or exceed the mileage tax fees imposed by the State. In addition, carriers incur the costs of additional record-keeping.
>
> • • • •
>
> *The evidence is clear that motor carrier costs associated with* ton-mile and *mileage taxes are outrageous and frequently equal to or in excess of the taxes paid.*[14]

It was concerns such as those just quoted that impelled this Court in 1950 not to retreat from its validation of flat taxes, and to remand the carriers to Congress:

> Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. . . . Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that *such burdens may be sufficient to justify states in ignoring even such a key factor as mileage*, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. *Aero Transit Co. v. Georgia Comm'n*, 295 U.S. 285, 289. Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is

---

[14] Reith, *Ton-Mile Taxes Revisited*, in AASHTO Quarterly, July 1984, at 14-15 (published by American Association of State Highway and Transportation Officials) (emphasis added). ATA also detailed the weaknesses of taxing schemes "depend[ent] on carriers 'declaring' the miles travelled by their vehicles" in *Comments of American Trucking Association on Study of A Federal Weight-Distance Truck Tax*, before the Federal Highway Administration, U.S. Dept. of Transportation, FHWA Docket No. 85-20 (Oct. 24, 1986), at S6-S7. ATA's view is shared by other representatives of the trucking industry. See, *e.g.*, AASHTO Quarterly, July 1984, at 11 (views of President of Owner-Operators Independent Drivers Ass'n of America).

> shown to be in excess of fair compensation for the privilege of using state roads. [*Capitol Greyhound*, 339 U.S. at 546-47, emphasis added, footnote omitted.]

This passage was quoted as authoritative in *Evansville Airport v. Delta Airlines*, 405 U.S. 707, 716-17 (1972) and in *Massachusetts v. United States*, 435 U.S. 444, 463-64 (1978), and in the latter decision the Court added this further observation:

> [E]ven when an annual flat fee results in some overcharges, the . . . [alternative proposed] solution would often increase the fiscal burden on [those [taxed]. If the [taxing authority] were required more precisely to calibrate the amount of the fee to the extent of the actual use of the airways, administrative costs would increase and so would the amount of revenue needed to operate the system. The resulting increment in a [taxpayer's] actual fair share might well be greater than any overcharge resulting from the present fee system. [435 U.S. at 466.]

This is, as we understand it, precisely the point that ATA's Director of Economics and Taxation has declared to be equally true today (pp. 10-11, *supra*).

That there remains "concern about the feasibility of administering graduated highway taxes" (ATA Br. 42) is perhaps most clearly evidenced by Congress' choices to date in structuring the *federal* heavy vehicle use tax. To date, Congress has imposed a flat weight-based tax—*e.g.*, $550 per year for every truck of 75,000 pounds or more—regardless of miles driven. 26 U.S.C. § 4481(a). But Congress knows that there is enormous variation in the number of miles driven by such trucks, 25% traveling less than 40,000 miles per year while another 25% travel over 100,000 miles per year.[15] As this is a use tax, designed to raise revenues for highway repair, the disproportionately high per-mile cost for low-mileage trucks

---

[15] *Report to Congress: Alternatives To Tax on Use of Heavy Trucks*, *supra* n.12, at IV-4; see also, *id.* at IV-10.

has been seen as an inequity.[16] But the federal flat tax has been rationalized as follows:

> Many compromises must be made in developing an acceptable set of user charges . . .
>
> * * * *
>
> The uniform and simple user charges required by administrative necessity may result in less than ideal equity and efficiency. Equity, efficiency, and a desired revenue yield can be achieved only to the extent user charges are effective in collecting from the motorists their cost responsibilities. Therefore, payment ease, administrative feasibility, and the level of compliance are just as critical to the attainment of the first three objectives as an empirically correct and precise calculation of the cost responsibilities. Without universal application and collection, even the theoretically most equitable and efficient tax structure will not be fair and will not raise the required revenues.[17]

In 1982, Congress commissioned a study by the Department of Transportation of the feasibility of switching to a tax that would vary not only with the weight of the truck but also with miles driven. P.L. 97-424, § 513(g). The Department's report, submitted in January, 1984, concluded that a weight-distance tax "would be a major modification to current administrative practices, and the cost implications are uncertain."[18] The Department explained:

> The additional component, mileage, is the key administrative cost variable for this alternative. How the mileage is reported and the degree to which it can be verified will determine the administrative cost.[19]

While believing that "weight-distance tax schemes hold a great deal of promise for simpler, more equitable user

---

[16] *Id.* at I-1.

[17] *Id.* at V-3.

[18] *Id.* at VII-10.

[19] *Id.* at VII-10.

charge structures *over the long-term*" [20], the Department ended its report with this equivocal conclusion:

> The Department believes that application of a weight-distance tax instrument at the Federal level may be possible at some time in the future, depending on the results of further analysis. The Department will continue to investigate potential benefits and problems of a weight-distance tax with an eye to its future use as a major component of the highway user charge structure.[21]

Congress reacted by commissioning another study, "to evaluate the feasibility and ability of weight-distance truck taxes to provide the greatest degree of equity among highway users," the study to include "an evaluation of the evasion potential for weight-distance taxes." P.L. 98-369, § 933 (1984). The Department of Transportation's report to Congress on this study is due by October, 1987, *id.* § 934.

Congress' caution respecting a *federal* mileage-based tax establishes *a fortiori* the uncertain reliability of *state* mileage-based taxes. For a *federal* mileage-based tax could be audited simply by periodic readings of a truck's odometer.[22] Such readings, however, could not inform a state as to the number of miles driven in that state.

In sum, deciding whether states should be relegated to depending entirely upon mileage-based taxes requires a balancing of policy considerations and the resolution of difficult fact questions. How reliable can collection of mileage-based taxes become, and what are the administrative costs necessary to achieve that reliability? Is it worth undertaking (or imposing) those costs to eliminate the potential inequities of flat taxes? And, above all, what is the real extent of those potential inequities, given

---

[20] *Id.* at VII-11 (emphasis added).

[21] *Id.* at VIII-3.

[22] *Id.* at VII-11.

that flat taxes invariably are but a small component of a state's multifaceted tax structure in which in-state trucks pay registration fees that are not charged to out-of-state trucks, and all trucks are charged fuel-use taxes that (however unreliable their collection) *are* mileage-based?

Congress, which can conduct public hearings and direct studies by the Executive Branch, is far better situated than this Court to weigh and resolve these policy and factual issues. Where sound decision turns on "the kind of investigation, examination and study that legislative bodies can provide and courts cannot," the matter is better left to Congress to resolve. *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980). See also, *Steelworkers v. Bouligny, Inc.*, 382 U.S. 145, 152-53 (1965); *United States v. Topco Associates*, 405 U.S. 596, 609-12 (1972); *Texas Industries, Inc. v. Radcliff*, 451 U.S. 630, 646-47 (1981).

Certainly, the sole evidence that ATA proffers in its brief as the predicate for judicial dictation of exclusively mileage-based tax systems—that every state now imposes a mileage-related fuel-use tax as *one* component of its multi-tiered tax structure (App. 39, 42)—is not dispositive of how the balance should be struck. A substantial segment of America's trucking industry does not report mileage under these fuel use tax schemes,[23] and with respect to those trucks which do report, each state's knowledge of the miles actually driven in that state is dependent on self-reporting by the trucking companies, "the honor system" (*supra*, p. 10).[24] That states obtain a *portion*

---

[23] "Based on existing state requirements, it is estimated that about 85 percent of all trucks weighing 50,000 pounds or more report mileage"; "[v]ehicles below this weight threshold do not normally report their mileage to any authority, and it is likely that such mileage records are not maintained." Druhan, *Federal Weight-Distance Tax*, in AASHTO Quarterly, July 1984 (*supra*, n.14) at 7.

[24] Pennsylvania legislators, in the deliberations leading to adoption of the marker fee, noted the enforcement problems Pennsyl-

of the revenues they need for highway construction and maintenance in this unreliable manner should not mean that, as a matter of constitutional dictate, they must depend on this for the *entirety* of their revenues from trucks registered out-of-state.

Moreover, ATA's suggestion that the present-day imposition of mileage-based taxes by states is a *new* development that should alter this Court's view toward flat taxes founders on the additional fact that the development is *not* new. Indeed, in *Capitol Greyhound*, this Court upheld a flat tax notwithstanding that the state also charged a mileage tax, 339 U.S. at 546. The existence of the latter was cited by this Court not as a ground for invalidating the flat tax, but rather as a ground for upholding it: the mileage tax ameliorated any potential inequity that out-of-state vehicles might suffer from a

---

vania was encountering in attempting to collect its mileage-based fuel-use tax (J.A. 118-20). Vermont's system for collecting its mileage-based fuel-use tax reflects the problems inherent in enforcing such taxes. Today's large trucks can travel up to 800 miles without refueling. It is thus a matter of chance (from Vermont's standpoint) whether a truck traveling through Vermont stops to purchase fuel in Vermont. If it *does*, Vermont collects a tax at the pump. Of course, some of that fuel—probably most—will actually be used in other states. And if the truck does *not* purchase fuel in Vermont, Vermont receives no tax at the pump.

Vermont requires trucking companies to report quarterly the number of miles their trucks have driven in Vermont. If the number of miles reported is less than would justify the tax Vermont has collected at the pump from that company, Vermont refunds the excess. If the number of miles reported warrants a tax that is higher than the amount Vermont has collected at the pump, the company must remit the balance with its report.

As is evident, the amount Vermont ultimately collects from a trucking company is wholly dependent on the company's self-reporting as to the number of miles it has driven in Vermont. For Vermont to vigorously police the reliability of these reports—either through actual monitoring of trucks on its highways or through post-filing audits (most of which would have to be conducted in distant states)—would be enormously expensive.

flat tax alone. *Id.* See also, *Evansville Airport*, 405 U.S. at 716 ("That toll [in *Capitol Greyhound*] was supplemental to a standard mileage charge imposed by the State, so that 'the total charge as among carriers [did] vary substantially with the mileage traveled.' ").

B. ATA contends that the world has changed in yet another way: interstate trucking is now dominated by large, nationwide trucking companies (ATA Br. 43-45), and if flat taxes were implemented in all states the cumulative burden on such companies would be prohibitive (*id.* 35-37). For several reasons, this does not constitute justification for overturning this Court's flat tax jurisprudence.

First, the concern is wholly theoretical. Flat taxes have been held constitutional for over 70 years—Vermont, for example, has imposed a flat tax on trucks for at least 60 years—yet there are only seven states that impose flat taxes on trucks. Not surprisingly, these are states with unique revenue problems respecting the construction and maintenance of their highways that are not shared by the majority of states. Vermont's dilemma is described at p. 8, n.13, *supra*. Pennsylvania's brief describes its unique circumstances, which are similar.

Second, were the theoretical concern ever to become a real one, it is inevitable that Congress would act promptly to solve the problem. As we have described, the subject of state use taxation of the motor carrier industry is squarely in Congress' focus, and Congress has shown that it will act when convinced that states have adopted truck taxes that "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11503a(b).

Third, and most important, the flat tax doctrine has a built-in protection against the phenomenon ATA conjectures: a flat tax will be invalidated if the amount is shown to be "excessive in comparison with the govern-

mental benefit conferred." *Evansville Airport*, 405 U.S. at 717. See also, *Capitol Greyhound*, 339 U.S. at 547. In the *absence* of such a showing, this Court has held that flat taxes are not to be invalidated on the basis of conjecture that they might proliferate and render the cost of transportation prohibitive. *Evansville Airport*, 405 U.S. at 721-22. ATA has not even attempted, in its challenges to the Pennsylvania and Vermont taxes, to show that they are excessive in comparison with the benefit conferred, for the evident reason that these states plainly need the revenues in question to meet their unusually high per-mile highway maintenance and construction costs. On the other hand, were other states, whose revenue needs are already met without flat taxes, to adopt such taxes on top of their existing tax structures, those taxes *would* be vulnerable to a showing that they exceeded fair compensation.[28]

Finally, that the trucking industry is now dominated by large, nationwide companies means that the problem—if one exists—is not of the type that customarily has commanded concern under the discriminatory tax doctrines evolved by this Court. Those doctrines have been designed to prevent states from creating "preferential trade areas," *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), through the enactment of taxes that "favor local enterprises at the expense of out-of-state businesses," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). The nationwide trucking firms, however, have terminals in numerous states, and, as many states do not even require a terminal as a condition of registration, these firms are free to register their trucks virtually where they please, indeed to register

---

[28] This consideration is an answer, as well, to ATA's concern respecting retaliatory taxes (ATA Br. 37-39). It is evident that any state that, by imposing retaliatory taxes, increased its charges to an amount exceeding fair compensation, would be vulnerable to invalidation of the tax under the flat tax decisions.

some trucks in one state and others in others.[26] ATA's depiction of Pennsylvania-registered trucks as "Pennsylvania-based" thus is artificial: trucking companies engage in registration "shopping."[27] While, theoretically, states might use their tax structures as a means to encourage trucks to *register* there rather than elsewhere, it is certain that that is neither the purpose nor the effect of the Pennsylvania and Vermont tax structures. For both states have *registration* fees that far exceed the national average (JA 178), that dwarf in impact any incremental disadvantage suffered by out-of-state registrants from the flat taxes, and that thus render these states uniquely undesirable as choices for registration.

C. ATA's effort to discern a change in the law that justifies overturning the flat tax decisions is equally unavailing. There has, to be sure, been a change in this Court's analysis of *general revenue* taxes—a change that began before, and was memorialized in, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). That change was designed to make it *easier*, not *harder*, for states to validate such taxes, *id.* at 288-89. But the more important point is that that line of decisions is not applicable in evaluating user fees of the type involved here. As this Court explained in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 & n.12 (1981):

> The Montana Supreme Court held that the coal severance tax is 'imposed for the general support of the government' . . ., and we have no reason to question this characterization of the Montana tax as a general revenue tax. *Consequently, in reviewing appellants' contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and de-*

---

[26] JA 189-81.

[27] JA 189-91, 158-60, 181-82; *Report to Congress, Uniform State Regulations*, *supra* n.4, at 11.

fended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. See, e.g., Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Ingels v. Morf*, 300 U.S. 290 (1937).[12]

---

[12] As the Court has stated, "such imposition, although termed a tax, *cannot be tested by standards which generally determine the validity of taxes.*" *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 190 (1931). . . . [Emphasis added; one footnote omitted.]

Each of the decisions cited in this passage involved a flat tax imposed on transportation. The flat tax decisions have elaborated a set of applicable considerations that differ somewhat from those applied to general revenue taxes, reflecting the different nature of user fees. Not surprisingly, this Court's most recent user fee decisions—which even ATA concedes post-date the change in the law respecting general revenue taxes (ATA Br. 48-49)—rely extensively on the earlier flat tax decisions in evaluating the validity of the fees under challenge, and do not cite a single general revenue decision as pertinent to that analysis. *Evansville Airport*, 405 U.S. at 715-720; *Massachusetts v. United States*, 435 U.S. at 463-67. Conversely, *Complete Auto Transit*, in describing the run of cases it was attempting to harmonize, cited only general revenue cases and not a single flat tax case, 430 U.S. at 278-89. There has, in sum, been no change in this Court's decisional law that undercuts in any way the vitality of the flat tax decisions.

II. PENNSYLVANIA'S MARKER FEE AND AXLE TAX ARE NOT INVALID UNDER THIS COURT'S FLAT TAX DECISIONS.

In Part I, we have shown that this Court's flat tax decisions should not be overturned. We now address the application of those decisions to the marker fee and axle tax challenged in this case.

A. The Marker Fee.

There can be little question but that the $25 marker fee that was in effect in Pennsylvania from 1981 to 1983 was valid under this Court's flat tax decisions. It was modest in amount, and was charged equally to Pennsylvania registrants and out-of-state registrants.[28] Although ATA analyzes the marker fee as though it were the sole charge imposed by Pennsylvania for the use of its highways, in fact it constituted a tiny component of a taxing scheme whose principal burdens were placed on Pennsylvania-registrants alone (the registration fee) and on all truck-users on a mileage basis (the fuel tax). The disparities that ATA depicts by looking solely at the marker fee are less dramatic than those that were shown in *Capitol Greyhound*, 339 U.S. at 546, but as the Court there noted, that is not in any event the proper perspective from which to assess the validity of the fee:

> [I]t should be noted that the total charge of Maryland for the privilege of using its roads will not show the same disparity among carriers. For Maryland also charges a mileage tax, and this tax added to the . . . [challenged] tax is what Maryland actually charges for its road privileges. Thus the total charge as among carriers does vary substantially with the mileage traveled. [*Id.* at 546, footnote omitted.]

See also, *Evansville Airport*, 405 U.S. at 715-16; *Massachusetts v. United States*, 435 U.S. at 467-70. Finally, ATA does not contend that Pennsylvaia's total taxing scheme, including the marker fee, imposed costs on out-

---

[28] ATA points out that "[f]or trucks registered in Pennsylvania, the fee was 'deemed a part of and included in the vehicle registration fee'" (ATA Br. 4). But ATA attaches no legal significance to this fact, and for an obvious reason: the law creating the marker fee, and containing this declaration, simultaneously increased the registration fee schedule in amounts far exceeding the amount of the marker fee (from $45 to $228, depending on the weight of the truck). See J.S. App. 7a.

of-state trucks "excessive in comparison with the governmental benefit conferred." *Evansville Airport*, 405 U.S. at 717; see also, *Capitol Greyhound*, 339 U.S. at 547.

At bottom, ATA argues nothing more than that the marker fee viewed in isolation—a small component of the total taxing scheme—cost *on average* more on a per-mile basis for out-of-state registrants than for in-state registrants. But that, of course, is precisely the argument this Court has held legally insufficient in its unbroken line of flat tax decisions.

B. The Axle Tax.

Although Pennsylvania imposed the axle tax equally on in-state and out-of-state registrants, ATA contends that the tax cannot be evaluated by traditional flat tax jurisprudence, because Pennsylvania simultaneously reduced its registration fees by the amount of the axle tax. This means, ATA contends, that the Pennsylvania scheme is discriminatory because it "effectively" visits the entire brunt of the increase on out-of-state registrants (ATA Br. 16).

ATA's contention is fallacious, because it focuses on a single frame of a moving picture. In 1980, Pennsylvania raised its registration fees by amounts exceeding the amount of the later axle tax, without imposing an equivalent burden on out-of-state registrants. When, in 1982, Pennsylvania adopted the axle tax, it rolled back the amount of its registration fees by the amount of the axle tax. The net effect of these two actions was no different than if Pennsylvania had adopted the axle tax in 1980, and simply not raised the registration fees in that amount (except, of course, that the latter course would have visited the axle tax on out-of-state registrants two years earlier). If Pennsylvania had followed the latter course, ATA would have had no "effective discrimination" claim; that course would have represented the simple adoption of a flat tax applied equally to in-state and

out-of-state registrants. And if Pennsylvania had adopted the axle tax in 1980, that tax would have been valid under the decisional law already discussed, particularly as ATA does not contend that it results in total charges to out-of-state registrants "excessive in comparison with the governmental benefit conferred." *Evansville Airport*, 405 U.S. at 717.[29]

The impact on interstate commerce of Pennsylvania's present tax scheme is no different than the impact had Pennsylvania enacted that scheme in one step rather than two. And, as ATA itself recognizes elsewhere in its brief (ATA Br. 42), but studiously avoids in the portion addressing the point just made (*id.* at 26-27), the Commerce Clause is concerned with the substantive effect of state tax laws on interstate commerce, not their form. It is simply not conceivable that if Pennsylvania's tax scheme does not burden or discriminate against interstate commerce, it could be held offensive to the Commerce Clause because arrived at in two steps rather than one. In ATA's words, "This Court's recent decisions have moved away from such empty fictions, which serve 'only as a rule of draftmanship' . . . , and instead look to the 'economic realities' . . . of the challenged tax" (*id.* at 42).[30]

---

[29] To be sure, the axle tax is larger in nominal dollars than flat fees this Court has approved before. But it is not larger in *real* dollars. In *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72, 74 (1939), this Court upheld an annual flat tax of $75 on two-ton trucks. See also, *Capitol Greyhound*, 339 U.S. at 546; *id.* at 559, 561 (dissenting opinion of Frankfurter, J.) Pennsylvania's axle tax, which applies only to trucks weighing 12 tons or more, is at its highest $180, far less in real today than $75 in 1939, indeed, less than $25 in 1935, as Pennsylvania's brief shows.

[30] ATA analyses the axle tax issue as though Pennsylvania, after a long period of static highway taxes, suddenly introduced a new tax applicable solely to out-of-state registrants. We have shown

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

JEFFREY L. AMESTOY
Attorney General
THOMAS R. VIALL
ROBERT C. SCHWARTZ
Assistant Attorneys General
State of Vermont
133 State Street
Montpelier, Vermont 05602

MICHAEL H. GOTTESMAN
(Counsel of Record)
Bredhoff & Kaiser
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

---

in text that that is not this case. But even if it were, on the record here such a tax would be valid.

States are not stuck forever with the relative burdens they happen to have imposed in the past on in-state and out-of-state registrants. If out-of-state registrants have been receiving a "free ride," states may act to impose a charge comparable to that already paid by in-state registrants. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583-87 (1937); *Alaska v. Arctic Maid*, 366 U.S. 199, 204-05 (1961). Here, the Supreme Court of Pennsylvania deemed the axle tax's cost to out-of-state registrants to be "compensatory" for the registration fees borne by in-state registrants alone. J.S. App. 33a-34a. ATA protests that Pennsylvania cannot "compenate" for the registration fees, because it has entered into reciprocity agreements with other states providing mutual waivers of registration fees (ATA Br. 23). This argument might have force if all states had the same registration fees. But the reality is that Pennsylvania's registration fee just prior to adopting the axle tax was more than $400 higher than the average of the states with which it had reciprocity agreements (see J.A. 178, which shows, for Pennsylvania, the fee *after* the $180 reduction upon adoption of the axle tax). Thus, Pennsylvania-registered trucks were paying $400 more for the use of Pennsylvania's highways than out-of-state registrants, even on the understanding that the latter's registration fees to their own states were payments for the use of Pennsylvania's highways.